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PLJ

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Opinions

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Mine Safety Appliances Company v. The North River Insurance Company

Asbestos—Silica—Coal Dust—Excess Insurance Coverage—Insurer Bad Faith

Breach of insurance action alleging insurer wrongfully failed to pay for defense costs and settlements related to asbestos, silica and coal dust exposure lawsuits. Jury verdict was that insurer breached applicable insurance contracts by not reimbursing settlement payments made by the insured in the amount of $10,909,057.86 and that insurer failed to act in good faith and deal fairly with insured. Non-jury verdict was that insurer violated the statutory bad faith prohibition of 42 Pa.C.S. 8371 and issued bad faith damages in the amount of $59,812,800.68.

No. GD 10-7432. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—November 28, 2017.

OPINION

I. Background

Plaintiff Mine Safety Appliances Company ("MSA") is a business corporation that was founded in 1914. From its inception to the present, MSA's business has been the manufacture and sale of safety equipment for laborers in dangerous conditions. Respirators for use by laborers in factories, coal mines and other dangerous environments have been manufactured and sold by MSA for more than sixty years.

Beginning in approximately 1970, laborers began filing products liability lawsuits against MSA. The lawsuits alleged MSA's respirators were defectively dangerous for failing to protect laborers from the lung diseases that result from working with silica and asbestos. MSA applied to Defendant North River Insurance Company ("North River") in 1980, 1981 and 1982 for "excess" insurance coverage against bodily injury claims and fully disclosed all of the silica and asbestos claims against it in the applications. MSA paid North River's premiums and received three policies that provided this "excess" coverage, which means the coverage only applies after exhaustion of MSA's underlying primary and umbrella insurance policy limits. Each North River policy provided MSA with $10 million of insurance coverage for claims of bodily injury, sickness or disease from exposure to injurious conditions.

In 2001, coal miners began to sue MSA on grounds similar to the silica and asbestos lawsuits. The coal miners alleged MSA's respirators were defectively dangerous for failing to protect them from coal workers pneumoconiosis, also known as "black lung." Unlike typical silica and asbestos lawsuits naming approximately one hundred defendants, coal miners lawsuits against MSA often involve only two or three defendants.

MSA's primary insurance coverage from 1952 to 1971 was with INA Insurance Company and from 1971 to 1986 MSA's primary insurance coverage was with Travelers Insurance Company. In 1981 INA and Travelers entered into a cost sharing agreement that determined the percentage of defense costs, settlements and verdicts each paid, with the percentage changing based upon the date of first exposure to an MSA product. The primary policies began to exhaust late in the 1980's, and all of them had exhausted by 2002. However, whenever a primary policy exhausted, the umbrella policy carrier provided MSA with continuing coverage under the cost sharing agreement, with six different insurers participating in the agreement at one point in time. The cost sharing agreement between insurers ended in approximately 2005.

Relative to Defendant North River's excess policies effective April 1, 1980, 1981 and 1982, each had a $5 million umbrella policy beneath it, with Puritan the carrier covering 1980-81, and Harbor the carrier covering 1981-82 and 1982-83. Harbor began paying MSA defense costs and settlements in August of 2002 and Puritan began doing so in December of 2002. In 2004, MSA had its first discussions with North River and advised it that the umbrella policies would be exhausting in the not too distant future. In May of 2006, MSA notified North River that the umbrella policies were nearly exhausted, and in July of 2006 the Harbor policies exhausted while the Puritan policy exhausted in August of 2006.

In September of 2007 MSA began to tender to Defendant North River the lawsuits against it from exposure to asbestos, silica and coal dust. North River's initial response was to ask for additional information, which MSA provided. North River, however, did not accept coverage of the claims, but instead asked for additional information. Even though North River asked for more information than any other insurer, MSA continued to provide whatever additional information North River requested. In addition, MSA officials met with North River officials in Chicago, London and in March of 2009 at the Duquesne Club in Pittsburgh. By this point, with North River still not accepting coverage of any of the claims tendered by MSA, it was clear to MSA that the intent of North River's unending requests for information was to indefinitely delay paying to defend and settle the lawsuits against MSA.

On April 9, 2010, North River commenced this proceeding by filing a Complaint for Declaratory Relief that named as Defendants MSA, several of its other insurers and the Plaintiffs in the lawsuits tendered to North River by MSA. North River averred in the Complaint that its 1980, 1981 and 1982 excess policies did not cover the asbestos, silica and coal dust related claims that MSA had tendered and requested this Court to declare as much. In June of 2010, MSA filed a Counterclaim that averred North River breached the three insurance contracts by not paying for defense costs and settlements and by failing to act in good faith and deal fairly with MSA. The Counterclaim also averred that North River violated Pennsylvania's statutory prohibition against insurer bad faith set forth in 42 Pa. C.S. §8371.

The Honorable Judge R. Stanton Wettick Jr. handled this proceeding as "Commerce and Complex Litigation" (*see* Allegheny County Local Court Rule No. 249(1)) from 2010 until it was assigned to me in July of 2016. Judge Wettick made numerous pre-trial rulings. He promptly dismissed the Plaintiffs in the lawsuits MSA had tendered to North River and he stayed North River's Declaratory Judgment Complaint. Thereafter, the litigation moved forward only on MSA's breach of contract and bad faith complaint. He disposed of multiple summary judgment motions made by MSA and North River, which reduced the number of disputed issues. On September 13, 2016, I heard argument on motions in limine, and from September 16 to October 6, 2016 I presided over the jury trial of the dispute. The Jury's Verdict was that North River breached all three insurance contracts by not reimbursing MSA's settlement payments and defense costs in the amount of $10,909,057.86, and that North River also breached all three insurance contracts by failing to act in good faith and deal fairly with MSA. My non-jury verdict was that North River violated the statutory bad faith prohibition set forth in 42 Pa.C.S. §8371.

Over the course of five days during December of 2016 and January of 2017 I heard testimony on the issue of damages relative to North River's statutory bad faith. In February of 2017 I issued a verdict on bad faith damages against North River in the amount of $46,912,213.11 ($30 million in punitive damages, $11,831,991.76 in attorney fees and costs and $5,080,221.35 interest at the prime rate plus three percent) and in June of 2017 I supplemented the attorney fees by $1,969,594.96 and the costs by $21,934.75. The grand total of these jury and non-jury verdicts against North River is $59,812,800.68.

After denying North River's and MSA's Motions for Post-Trial Relief, in August of 2017 I directed the entry of judgment on the verdicts. North River then appealed to the Superior Court of Pennsylvania and filed a concise statement of errors complained of on appeal ("Concise Statement" hereafter). Pursuant to Pennsylvania Rule of Appellate Procedure no. 1925(a), the balance of this Opinion addresses the alleged errors identified by North River in the Concise Statement.[1] This Opinion addresses each alleged error in the identical sequence in which each appears in the Concise Statement, with the roman numbers and letters of each title below matching the roman numbers and letters of the paragraphs in the Concise Statement.

II. Proof of Underlying Claims and Exhaustion

In paragraph II. of the Concise Statement North River contends I made an error by accepting only inadmissible hearsay evidence "that injuries alleged by the underlying claimants resulted from exposure to a toxicant while using an MSA product…." However, MSA did not have to establish its own liability to the underlying claimants "so long as … a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimants success against the [insured]." *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091 (2d Cir. 1986) *citing Damanti v. A/S Inger,* 314 F.2d 395, 397 (2d cir.) *cert. denied*, 375 U.S. 834, 84 S. Ct. 46, 11 L. Ed. 64 (1963); also *see* Windt, *Insurance Claims and Disputes* §6.31 at 6-244-249. To show "the facts known to the insured … culminating in a settlement," MSA offered into evidence a summary of the claims files and defense costs for the thirty eight underlying claimants. Since this evidence was offered to show MSA's knowledge of a potential liability and not "the truth of the matter asserted," it does not fall within the definition of hearsay. *See* Pennsylvania Rule of Evidence 801(c)(2). Therefore, I was correct in admitting this evidence.

North River makes this same argument, that there was only hearsay evidence, relative to MSA's proof of exhaustion of the Puritan and Harbor umbrella policies. However, there was extensive testimony received on the topic of exhaustion that did not involve hearsay, including testimony from representatives of Puritan and Harbor and MSA's Director of Litigation and Risk Management, William Berner. North River objected on the basis of hearsay to the admission of "loss runs" from the umbrella carriers. The "loss runs" from MSA's insurers typically set forth, during a policy period, for each payment made under the policy, the date of payment, the name of the claimant and the date of first exposure. It was clear to me that, in the insurance industry, a "loss run" will be provided to an insurer as evidence that the policy beneath it has been exhausted. The testimony from the Puritan and Harbor representatives established that the loss runs fall under the hearsay exception for business records, now known as "records of regularly conducted activity." *See* Pennsylvania Rule of Evidence no. 803(6). Because the loss runs fall within this exception to the hearsay rule and because there was much additional testimony to evidence exhaustion, there was sufficient proof of exhaustion of the umbrella policies.

III. A. Jury Charge on Proof of Underlying Claims and Exhaustion

In paragraph III.A. of the Concise Statement North River contends I made an error by not instructing the Jury that MSA had the burden to prove "the underlying claims involved exposure to a toxicant as a result of the use of an MSA product during the period of the North River policies." But, as I mentioned above, MSA only had to show the settlement amounts were "reasonable in view of the size of possible recovery and degree of probability of claimants success against [MSA]." *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091. My instruction to the Jury did set forth that burden of proof. *See* Jury Trial transcript ("J.T." hereafter), pp. 2398-2399. Therefore, my instruction to the Jury on MSA's burden of proof was correct.

III. B. (1) Jury Charge on Known Loss by MSA Risk Manager

In paragraph III.B. (1) of the Concise Statement North River contends I made an error in the "known loss" defense instruction to the Jury because I said North River had to prove MSA's risk manager (or other employee involved in purchasing the North River policies) knew of a likely exposure to losses. North River, however, is mistaken as the instruction is consistent with the law on the known loss defense set forth by the Pennsylvania Supreme Court. *See Rohm & Haas Co. v. Continental Casualty Co.*, 781 A. 1172 at 1177-1178 (Pa. 2001). Therefore, this instruction to the Jury was appropriate.

III. B. (2) Jury Charge on Known Loss and Exhaustion

In paragraph III.B.(2) of the Concise Statement North River contends I made another error in the known loss defense instruction to the Jury because I said North River had to prove MSA knew all of its primary and umbrella policies would be exhausted. North River again is mistaken as the instruction also is consistent with Pennsylvania law. *Id.* at p. 1177. Thus, this instruction to the Jury also was appropriate.

III. C. Pollution Exclusion

In paragraph III. C. of the Concise Statement North River contends I erred by granting MSA's motion in limine to preclude North River from offering evidence regarding its pollution exclusion. The "pollution exclusion," which appears in each of the insurance policies at issue in this case, provides that:

> …this policy shall not apply to personal injury…arising out of the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any watercourse, or any body of water…"

In its Motion in Limine, MSA argued that collateral estoppel barred North River from entering any argument or evidence of this exclusion at trial. MSA and North River are also engaged in litigation in Delaware state court regarding the same insurance policies at issue in this case. In that case North River sought Summary Judgment precluding MSA from coverage on the basis of the pollution exclusion in each policy. The issue was briefed and argued by each party, and the Delaware court issued a detailed Memorandum Opinion denying North River's Motion and finding the pollution exclusion inapplicable to MSA's claims. Based on this result in the Delaware action, MSA filed a motion *in limine* to preclude North River from entering evidence of the pollution exclusion as a defense in this case. Collateral estoppel applies when:

> (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.
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> *Heldring v. Lundy Beldecos & Milby, P.C.*, 2016 PA Super 263, 151 A.3d 634, 644 (2016) *citing Selective Way Ins. Co. v. Hospitality Grp. Servs., Inc.*, 119 A.3d 1035, 1042 (Pa. Super. 2015).

In the Delaware case, the issue was whether the pollution exclusion applied to MSA's claims, MSA and North River were both parties to the action, and both had a fair opportunity to argue their position on its applicability. Therefore, it is clear the first, third, and fourth factors for the application of collateral estoppel have been met. Collateral estoppel is intended to preclude the re-litigation of issues of law or fact in a subsequent action. *Yonkers v. Donora Borough*, 702 A.2d 618, 620 (Pa. Commw. Ct. 1997), *citing PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley)*, 665 A.2d 538 (Pa.Cmwlth.1995). In the Delaware action, the court specifically ruled that the pollution exclusion was not applicable to MSA's claims for coverage and thus not a defense available to North River. In its Memorandum, the Delaware court writes, "there is no reasonable interpretation that injury resulted from…" the types of contaminants contemplated in the pollution exclusion. The Delaware court further explains that a finding that coal dust is a pollutant would render the insurance coverage "illusory." The court succinctly explains why it denied North River's motion, by explaining that the coal dust itself did not cause the injury, but "Rather, this is a case about coverage for injuries caused by an allegedly defective product designed to counter the effects of exposure to dangerous materials." North River argued in opposition to the motion that the ruling in the Delaware case is not "final" for the purposes of collateral estoppel. In Pennsylvania, "a final judgment includes any prior adjudication of an issue in another action that is sufficiently firm to be accorded conclusive effect." *Commonwealth v. Holder*, 805 A.2d 499, 502 (Pa. 2002) *citing Restatement (Second of Judgments)* §13, cmt g). Delaware's ruling is very firm regarding why the pollution exclusion is inapplicable and is sufficient to be considered a final judgment on the issue. One of the purposes of collateral estoppel is to prevent inconsistent decisions. *Office of Disciplinary Counsel v. Kiesewetter,* 889 A.2d 47, 51 (Pa. 2005). The parties and the issues in the Delaware case are identical to this case and failing to hold that collateral estoppel applies to Delaware's ruling on the pollution exclusion would result in inconsistent decisions and violate one of the purposes of the doctrine. Therefore, I did not commit an error by granting MSA's motion in limine to preclude North River from offering evidence of the pollution exclusion.

III. D. *Couch Trial*

In paragraph III. D. of the Concise Statement North River contends I erred by granting MSA's motion in limine to exclude evidence of the *Couch* trial and denying North River's motion in limine to preclude MSA from denying that it acted with reckless disregard and that such conduct was a substantial factor in causing injuries and damages. The *Couch* trial was a personal injury case brought in Kentucky by Plaintiff Couch against MSA and other defendants. The jury in the *Couch* case found MSA 80% liable for Plaintiff Couch's injuries, awarded him $4,000,000 in damages, found that "MSA acted with reckless disregard for the lives, safety, or property of others, including Mr. Couch," and awarded Plaintiff Couch $4,000,000 in punitive damages. MSA presented motions in limine to preclude North River from entering evidence presented during the *Couch* trial, or evidence of the jury's finding that served as the basis for its award of punitive damages. MSA argued that this type of evidence has a low probative value, would confuse the jury, and is highly prejudicial to MSA. North River argued that it should be able to admit this evidence based on collateral estoppel and that barring this evidence would afford MSA the opportunity to relitigate the issues of the *Couch* case. North River further argues that the jury's findings in the *Couch* trial are necessary to support their defense that the injuries for which MSA seeks coverage were "expected and intended" by MSA, as well as necessary to their defense against MSA's bad faith claims. Relevant evidence may be excluded if it is unfairly prejudicial. Unfair prejudice includes evidence that would divert the jury's attention, or induce the jury to make a determination on an improper basis. It is the job of the trial court to balance the probative value of evidence against the potential for prejudice when determining whether to admit evidence. *See Parr v. Ford Motor Company*, 109 A.3d 682, 696 (Pa.Super. 2014). Relevant evidence can also be excluded if it would confuse the jury. *Commonwealth of Pennsylvania v. Baez*, 720 A.2d 711, 724 (Pa. 1988). I determined that evidence from the *Couch* trial, which involved MSA's duty to its customers and breach, to be irrelevant to the different issues in this case, which involve questions of North River's duty to MSA and whether North River acted with bad faith. Further, I felt that the jury's findings and verdict in the *Couch* trial, particularly given the large size of the verdict, would distract the jury in this trial from the main insurance inquiries in this case and therefore be irrelevant. North River argues that evidence of the *Couch* trial is necessary to support its defense to MSA's bad faith claims; however the present litigation was initiated in 2010, and the *Couch* verdict was reached in 2016, so North River's argument that evidence of the jury verdict supports its denial of coverage is illogical. Although the jury in the *Couch* trial found that MSA acted with recklessness, recklessness is not sufficient to support an exclusion based on "expected or intended" injuries. *Erie Insurance Exchange v. Fidler*, 808 A.2d 587, 589-90 (Pa.Super. 2002) *citing USAA v. Elitzky*, 517 A.2d 982, 987 (Pa.Super. 1986). Therefore, admitting evidence that another jury found that MSA acted in a manner that does not necessarily bar them from coverage under their policy with North River would only confuse the jury while also painting MSA in a bad light and is unfairly prejudicial to MSA. Therefore, it was appropriate to grant MSA's motion in *limine* and I committed no error.

III. E. Expected or Intended Defense

In Paragraph III.E. of the Concise Statement North River contends that I erred by granting MSA's motion in *limine* to preclude North River from offering any evidence or argument respecting its "expected or intended" defense. In the Delaware action, MSA filed a Motion for Partial Summary Judgment on the Expected or Intended Exclusion, both parties briefed and argued the issues. The Delaware court determined that North River had not met its substantial burden of proof that the "expected or intended" exclusion applied to MSA's claims, and granted MSA's Motion for Partial Summary Judgment. Collateral estoppel will apply when: (i) the issue decided in the first action is identical to the one presented in the other action, (ii) the issue was actually litigated in the first action, and (iii) a final judgment on the specific issue in question was issued in the first action. *Commonwealth v. Holder*, 805 A.2d 499, 502 (Pa. 2002). These factors have been clearly met. First, the issue is identical. In both the Delaware case, and this case North River attempts to raise the "expected and intended" exclusion of the insurance policies as the reason for its denial of MSA's claims. An issue is "actually litigated" when it is properly raised, submitted, and determined. *Id. Citing Restatement (Second of Judgments)* §13, cmt d. MSA properly raised the issue by filing a Motion for Summary Judgment in the Delaware case, submitted it for determination by offering a brief and argument on the issue, and ultimately it was determined by the thorough

Opinion and Order entered by the Delaware court. Therefore, the second factor is met. Finally, the Order entered by the Delaware court is "final" because a judgment in a prior case is considered final for the purposes of collateral estoppel "unless or until it is reversed on appeal," which the Delaware ruling has not been. *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996). Therefore, North River's attempt to raise the "expected or intended" defense is barred by collateral estoppel and I did not err by granting MSA's motion in *limine* to preclude North River from entering any evidence of that defense.

IV. A. Proof of Bad Faith

North River also contends I made an error by not dismissing MSA's claim for breach of the duty to act in good faith and MSA's claim for statutory bad faith under 42 Pa. C.S. §8371. In paragraph IV. A. of the Concise Statement North River contends MSA did not prove by clear and convincing evidence that North River lacked a reasonable basis for denying benefits under the insurance policies and knew or recklessly disregarded this lack of a reasonable basis. *See Rancosky v. Washington National Insurance Company*, 170 A.3d 364 (Pa. 9/28/2017). North River's argument is meritless as there is strong evidence North River had no basis to deny coverage and knew or recklessly disregarded it. To determine if North River had a reasonable basis for denying benefits to MSA involves "an objective inquiry into whether a reasonable insurer would have denied payment of the claim under the facts and circumstances presented." *Rancosky v. Washington National Insurance Company,* 170 A.3d at 374, *citing Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W. 2d 368 at 377. MSA's proof that a reasonable insurer would have paid it benefits includes umbrella insurers Puritan and Harbor having paid benefits to MSA based upon much less information than was provided to North River. *See* J.T., pp. 303-304, 326-327 and 543-544. Also, industry practice would be to communicate directly with these carriers with any questions about exhaustion of their policies, but North River failed to do so. *See* J.T., pp. 302 and 606-607. Additionally, North River avoided paying MSA's underlying claims by requesting far more medical, employment and product usage information than any of MSA's other insurers. *See* J.T. pp. 326-327 and 543-544. This is clear and convincing evidence North River lacked a reasonable basis for denying benefits under the insurance policies.

"Smoking gun" evidence of personal animus towards MSA, self-interest or ill will is not required to prove North River knew or recklessly disregarded its absence of a reasonable basis to deny benefits. *See Rancosky v. Washington National Insurance Company* 170 A.3d at 376. However, there is this type of "smoking gun" evidence against North River. Communications between claims adjusters in 2006 described reviewing voluminous court documents from a personal injury case against MSA as "a big pain in the ass." Plaintiff's trial exhibit 952. Information requested in North River's claims investigation focused on North River's internal business reasons instead of the merits of the underlying claims against MSA. *See* J.T., p. 325. At a meeting in March of 2009, a North River officer threatened to "rat out" MSA (by disclosing to the public the alleged defects in its respirators) and to hire experts being used by plaintiffs in the underlying litigation to testify against MSA. *See* J.T., p. 635. The evidence most indicative of North River's personal animus towards MSA comes from West Virginia litigation against MSA filed by a coal miner named Norman Moore. Similar to many of the claims for which MSA sought coverage in this proceeding, Mr. Moore sued MSA because he allegedly developed black lung after using an MSA respirator. MSA reached an out-of-court settlement with Mr. Moore that included assignment of MSA's insurance benefits from North River. The assignment put Mr. Moore "in the shoes" of MSA, but North River handled coverage for Mr. Moore in the manner it refused to do for MSA. North River paid Mr. Moore his settlement without erecting any of the multiple defenses faced by MSA.

There also was substantial circumstantial evidence that North River knew or recklessly disregarded its absence of a reasonable basis for denying benefits. From 1994 until the 2016 Jury Verdict North River took the position that MSA had not proven exhaustion of the umbrella policies, but it provided no evidence during the trial to contradict MSA's evidence proving exhaustion. Even though North River called a witness to testify in support of its known loss defense, this defense was very weak because MSA would have needed a "crystal ball" to see that a coal miner lawsuit would be filed twenty years in the future. Until I signed an order directing North River's counsel to use their best efforts to produce its corporate designee, Bryce Larrabee, as a trial witness for MSA, North River refused to make this resident of New Hampshire available as an MSA witness. *See* Motions in Limine Argument transcript ("M.L.A." hereafter), pp. 314-325 and 9/14/2016 Order of Court (Department of Court Records document no. 537). North River also attempted to delay the Jury Trial by means of a meritless eve-of-trial interlocutory appeal from my decisions on two motions in limine. *See* Pennsylvania Superior Court docket no. 1366 WDA 2016. Thus, MSA proved by clear and convincing evidence that North River lacked a reasonable basis for denying insurance benefits and knew or recklessly disregarded this lack of a reasonable basis. Hence, I acted correctly in refusing to dismiss MSA's claim for breach of the duty to act in good faith and MSA's claim for statutory bad faith under 42 Pa. C.S. §8371.

IV. B. Underlying Claims Dismissed by MSA

In paragraph IV.B. of the Concise Statement North River contends I made an error by not dismissing the breach of duty to act in good faith and statutory bad faith claims "where the court held that North River has no liability on 655 of the 730 underlying claims…." North River not being liable on 655 of the 730 underlying claims results from a ruling made on June 30, 2015 by Judge Wettick on one of North River's motions for summary judgment. He ruled that North River's policies contained no duty to defend and could cover defense costs for only those underlying cases that MSA settled. Hence, MSA dismissed, without prejudice, its claims against North River arising in 655 of the underlying claims because they were not yet settled and therefore comprised exclusively of defense costs. As a result, the approximately $800,000 value of all 655 of the dismissed claims is minor when compared to the approximately $11 million in settlements and defense costs submitted to the Jury. Because the comparative value of the 655 dismissed claims is minimal, this was not a proper reason for dismissal of MSA's breach of duty to act in good faith and statutory bad faith claims.

V. A. Threat to "Rat Out" MSA

In paragraph V.A. of the Concise Statement North River contends I made an error by permitting the previously referenced "rat out" statement (*See* J.T., p. 635) to be admitted into evidence because it was made during confidential compromise negotiations. Pennsylvania Rule of Evidence no. 408(a) prohibits the admission of evidence of compromise negotiations offered to prove the validity or amount of a disputed claim. However, Rule no. 408(b) authorizes admission of this evidence for purposes other than proving the validity or amount of a disputed claim. The "rat out" statement was an insurer's threat to harm the revenues of its insured. It was offered into evidence to show North River's bad faith, which is a purpose other than proving the validity or amount of the claim, which therefore is admissible under Rule no. 408(b). The parties actually entered into a written agreement before the March, 2009 meeting that contained a confidentiality provision. *See* Exhibit 1 to Mine Safety Appliance Company's Motion

Respecting Use of Evidence of North River's Threats (Department of Court Records Document no. 639). Under the written agreement, communications made in connection with compromise negotiations are confidential. Since North River's threat to harm MSA's revenues is outside the boundaries of what is acceptable in compromise negotiations, the threat is not subject to the written agreement's confidentiality provision. Therefore, I correctly permitted admission of the "rat out" statement into evidence.

V. B. Evidence of Good Faith Settlement Negotiations

In paragraph V.B. of the Concise Statement North River also contends I made an error by precluding it from introducing evidence of its good faith compromise negotiations during the meeting when it threatened to "rat out" MSA. The threat made during the March, 2009 meeting was the subject of Motions *in Limine* by both parties, with extensive oral argument. *See* Motions *in Limine* Argument transcript, pp. 137-151. Also, during the Jury Trial, before the testimony on the meeting began, there was argument from counsel and I made it crystal clear that the testimony would be limited to the threatening statements by MSA, with Rule 408(a) prohibiting any testimony in the Jury's presence about compromise negotiations. *See* J.T., pp. 576-586. However, North River could have provided the Jury with testimony disputing the "rat out" threat, from the North River official who made it or from two other North River officials and two other MSA officials who were present for the threat. Instead, North River did not produce any evidence to dispute the threat and argues it should have been permitted to provide evidence of its good faith compromise negotiations during the meeting. If North River could testify about its good faith compromise negotiations, MSA would respond with its view that a good faith compromise should be a much larger amount, with the Jury exposed to evidence that is totally irrelevant to the true value of MSA's claims. In any event, North River ended up playing a videotaped deposition of Mr. Berner to the Jury with his testimony of the amount of the compromise offer made by North River during the March, 2009 meeting.[2] *See* transcript of videotaped deposition of William Berner taken May 9, 2012, pp. 106-107. Hence, although I was correct to prohibit testimony of North Rivers good faith compromise negotiations, North River still ended up getting evidence on the topic to the Jury.

V. C. Evidence of *Moore* Litigation and Settlement

In Paragraph V. C. of the Concise Statement North River contends I erred by denying its motion in *limine* to preclude MSA from submitting or relying on evidence of the *Moore* litigation and settlement. The "*Moore* litigation and settlement" references a West Virginia case that is factually very similar to the underlying litigation cases for which MSA is seeking coverage from North River in this proceeding. Norman Moore was a coal miner who used the "Dustfoe" respirator and developed coal-workers' pneumoconiosis ("CWP"). Mr. Moore sued MSA, who ultimately settled the case without admitting liability. As part of MSA's settlement with Mr. Moore, MSA assigned him the right to a certain amount of the proceeds of an insurance policy that is materially similar to the policies in this case that was issued to MSA by North River. Following the settlement with MSA, Mr. Moore sought declaratory relief that his claims were recoverable under the policy. North River settled the claim and paid Mr. Moore the amount assigned from the policy. MSA sought discovery regarding the *Moore* litigation and settlement, and Judge Wettick ordered that discovery regarding the case should be limited to the effect that the settlement had on the limits of any of the policies at issue in this case. In its motion in *limine* to preclude MSA from submitting evidence of the *Moore* litigation and settlement North River argued that this amounts to a determination that the *Moore* litigation and settlement are irrelevant as a whole and should be barred by the "law of the case" doctrine. North River further argues that Pa.R.E. 408(a) prohibits the admission of any evidence of the *Moore* litigation and settlement. It is true that the law-of-the-case doctrine prohibits a judge of coordinate jurisdiction from altering "the resolution of a legal question previously decided." *Commonwealth v. Starr,* 664 A.2d 1326, 1331 (Pa. 1995). Judge Wettick ruled that MSA must limit its discovery regarding the *Moore* litigation and settlement. The legal issue was what information MSA could seek in discovery; the legal issue that I ruled on was the admissibility of evidence that MSA obtained without a discovery order. Therefore, the admissibility of evidence of the *Moore* litigation and settlement was not previously decided and I did not disrupt Judge Wettick's discovery Order by admitting it. Further, Pa.R.E. 408(a) provides that evidence of a settlement may be offered for "another purpose" than demonstrating the validity or amount of a disputed claim, or impeachment. Evidence of the *Moore* litigation and settlement was not offered to prove that MSA was entitled to coverage or how much coverage to which it was entitled. It was offered to show how differently North River handled Mr. Moore's claim versus how it handled MSA's claims and therefore, that evidence was directly relevant to MSA's claim of bad faith. Therefore, I did not violate the law of the case or any rule of evidence and committed no error by denying North River's motion in *limine* to preclude MSA from submitting or relying on evidence of the *Moore* litigation and settlement.

V. D. Evidence of North River's State of Mind

In paragraph V. D. of the Concise Statement North River contends I erred by excluding evidence of North River's state of mind, "in particular, evidence of (a) the WV AG lawsuit; (b) "white paper" and testimony to NIOSH; and (c) North River's understanding of the etiology of CWP." The West Virginia Attorney General lawsuit ("the West Virginia action") is a case that was brought in 2003 by the state of West Virginia against MSA and two other defendants for the purpose of recovering reimbursement for the Workers Compensation payments the state has made to coal miners who developed lung illness despite wearing the defendants' respirators. In the lawsuit, the "WV AG" avers MSA is liable for the Workers Compensation payments for intentionally or knowingly causing the coal miners' injuries. Thirteen years after its filing, the case is still pending but has not gone to trial and no findings of fact have been made. Evidence is unfairly prejudicial if it would induce the jury to make a determination on an improper basis. *Parr v. Ford Motor Company*, 109 A.3d 682, 696 (Pa.Super. 2014). Here, it is likely that a lawsuit initiated by the state government would influence the jury to accept the validity of the claims in the West Virginia action, even though no facts have been determined in the case. During argument on MSA's motion in *limine* to preclude evidence of the West Virginia action, counsel for North River offers that evidence it will offer at this trial supports some of the allegations in the West Virginia action, effectively litigating the West Virginia action within the context of this case. (J.T., p. 565). It would confuse the jury to be burdened with determining the facts of the West Virginia action while also separately determining the facts of the case for which it was empaneled. Further, the allegations on their own have little probative value into the facts of this case. Therefore, the potential for prejudice and confusion outweigh any probative value into North River's state of mind and I did not err by precluding evidence of the West Virginia action.

The "white paper" is a document that was created by MSA employees and submitted to NIOSH[3] (the regulatory body that issues the government standards and approval of the type of respirators manufactured by MSA), during the comment period for rule making. An employee of MSA also testified before NIOSH in support of the contents of the "white paper." The paper and testimony were offered in 1994. Notably, the "white paper" and testimony included that testing with dioctylphthalate ("DOP") shows

electrostatic filters to be particularly dangerous because a user is unable to tell when the filter is working or not. (Motion *in Limine* Argument transcript, "M.L.A." hereinafter Sept. 13, 2016, pp. 55-56). North River argues that the conclusion reached in the 1994 "white paper" was based on testing that had occurred at MSA since 1955, when MSA began testing with DOP and therefore, although the "white paper" and relevant testimony post-dates the issuance of the insurance policies, it is evidence of what MSA knew prior to obtaining insurance coverage. (M.LA., pp. 56-57). First, North River intended to offer the testimony of Mr. Bevis, who possessed knowledge of the testing and information that allegedly served as the basis for the "white paper," so North River would still be able to offer that evidence without relying on a tenuous connection to a paper that was written 12 years after insurance coverage was obtained. (M.L.A., p. 57). North River's attempt to create a chain of connection between testing that commenced in the 1950s to a paper written in the 1990s would be speculative and confusing to the jury. Second, I specifically made an exception to my ruling for instances where references are made to information predating the insurance application, so that North River would not be precluded from offering evidence relevant to MSA's knowledge at the time of its application for insurance. Therefore, I committed no error by granting MSA's Motion in *limine* to Exclude Certain Evidence Re: North River's "Known Loss" and "Material Misrepresentation" Defenses.

North River intended to offer the testimony of multiple physicians on their understanding of the etiology of CWP to prove that there was a reasonable basis for the denial and their denial of MSA's claims were not in bad faith. MSA argued that the testimony of multiple physicians on in depth medical issues would distract the jury from the true nature of its bad faith claims. MSA argues that its claim for bad faith was not based on the denial of the claims, but rather the behavior of North River beyond the denial of the claims. Counsel for North River even agreed that, if MSA's bad faith claims were limited to the allegation that North River decided to take a position on what triggered coverage and only hired doctors to investigate the etiology of CWP to find support for their position, then the testimony of the doctors was unnecessary. (M.L.A., pp. 89-90). Further, in 2015 Judge Wettick denied North River's Motion for Partial Summary Judgment seeking a determination that the continuous-trigger approach does not apply to coal-mine dust claims. Judge Wettick held that "J.H. France's continuous-trigger approach applies to coal dust claims because…the injuries do not manifest themselves until a considerable time after initial exposure." Therefore, the law of the case already established which approach to triggering coverage was applicable in this case and testimony from multiple physicians on how the disease manifests was unnecessary. So from a logical standpoint, North River was able to refute the bad faith claims by offering testimony from its own employees regarding how the claims were handled, even without the detailed scientific testimony. What confuses me about this allegation of error, is that I *denied* MSA's Motion to exclude this medical and scientific testimony (M.L.A., p. 107). Therefore, it was the decision of North River's counsel not to offer evidence of its understanding of the etiology of CWP and therefore, I committed no error.

V. E. Lack of Jury Charge Defining "Recklessness"

In paragraph V.E. of the Concise Statement North River contends I made an error by not defining "recklessness" in the instruction to the Jury on breach of the duty of good faith and fair dealing. North River, however, did not request an instruction defining recklessness in its written Proposed Points for Charge or during the Charging Conference. *See* J.T. pp. 2231-2235. My charge to the Jury was consistent with North River's request that it contain Pennsylvania Suggested Standard Jury Instruction (Civil) no. 17.300, which repeats the word "recklessly" three times. By requesting an instruction that uses "recklessly" three times without either a written or oral request for a definition of recklessness in the instruction, North River waived its ability to raise lack of a recklessness definition after the trial. *See* Pennsylvania Rule of Civil Procedure no. 227.1(b)(1). Therefore, the lack of a recklessness definition in the Jury instructions was not an error.

Assuming North River has not waived the issue of recklessness not being defined and this was an error by me, it would be a harmless error. Because I prohibited MSA from offering evidence of damages from any breach of the duty of good faith and fair dealing, the Jury determined only that North River breached the duty. The Jury was not asked to determine damages resulting from this breach of duty and did not do so. Hence, any error in the Jury instruction on the duty of good faith and fair dealing did not harm North River.

In paragraph V.E. of the Concise Statement North River contends I also made an error by not defining recklessness in the jury charge because it "also indicates that the Court failed to properly guide its verdict on statutory bad faith with the required construction of 'recklessness'." Put another way, because I did not give the Jury a definition of recklessness, I must have applied the incorrect definition of recklessness in reaching the non-jury verdict on statutory bad faith. North River is mistaken as I applied the correct definition of recklessness in reaching the non-jury verdict. Hence, no error was made as to the definition of recklessness in connection with the non-jury verdict on statutory bad faith.

VI. A. Non-Jury Verdict Without Findings

In paragraph VI.A. of the Concise Statement North River contends I unfairly prejudiced its defense in the trial on damages for statutory bad faith because my non-jury verdict contained only the conclusion that North River acted in bad faith in violation of 42 Pa. C.S. §8371. North River argues I was required to set forth findings and conclusions underlying my verdict for it to be able to fairly defend itself in the trial on damages that began two months later. North River is unable to support this unusual argument with reference to caselaw or a rule of court. The reason for this lack of supportive authority is that the caselaw and applicable rule of court make it clear findings and conclusions are not required to support my verdict. *See Bensinger v. University of Pittsburgh Medical Center*, 2014 PA Super 174, 98 A.3d 672 at 684 (holding that Pennsylvania Rule of Civil Procedure no. 1038(b) does not require findings of fact and conclusions of law with a non-jury verdict). In any event, North River was in no way prejudiced as it was able to conduct discovery, including depositions of all of MSA's fact witnesses, in advance of the non-jury trial on damages. Therefore, North River was not unfairly prejudiced by the absence of findings of fact and conclusions of law.

VI. B. Punitive Damages Relation to Punishment and Deterrence

In paragraph VI.B. of the Concise Statement North River contends the $30 million punitive damages award is erroneous because it "is not reasonably related to the Commonwealth's interest in punishing and deterring bad behavior." Three factors are analyzed to determine if the size of a punitive damages award is unrelated to punishment and deterrence: "(1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant." *Hollock v. Erie Ins. Exchange*, 2004 PA Super 13, 842 A.2d 409, 419. The character of North River's acts, which are described above, is reprehensible. Instead of honoring its promise to cover MSA against bodily injury claims, some valued at over seven figures, North River refused to pay the claims based on unwarranted defenses, threatened MSA, but was willing to pay a single claim when MSA assigned its rights to another. MSA was

extensively harmed because it had to borrow the money to pay for the underlying claims settlement and defense, with there being both a borrowing cost in the form of interest owed and the lost opportunity for use of the funds to grow the business. When North River made good on one of its threats and hired underlying Plaintiffs' expert Darrell Bevis, Mr. Bevis obtained information that is harming MSA's ability to defend itself against thousands of claims that MSA's respirators failed to protect the Plaintiffs from lung disease. The wealth of North River, which was not disputed, was evident. As of December 31, 2015, it had over $1 billion in assets, $306 million in surplus, earned $57 million on investment income that year and could pay a $250 million judgment without its payment of ongoing claims being impacted. *See* Non-Jury Trial Transcript ("N.J.T." hereafter), pp. 81-83, 94 and 101. Therefore, the $30 million punitive damages award is reasonably related to punishment and deterrence and not erroneous.

VI. C. Evidence of Consequential Damages

In paragraph VI.C. of the Concise Statement North River contends the punitive damages award is erroneous because it "is based on improper evidence of consequential damages." However, before the Jury Trial began I ruled in favor of North River on a motion in limine that prohibited MSA from offering evidence of consequential damages under the breach of duty to act in good faith and deal fairly claim. What MSA describes as "improper evidence of consequential damages" was instead evidence of the nature and extent of the harm during the Non-Jury trial on statutory damages. Therefore, the punitive damages award was not erroneously based on evidence of consequential damages.

VI. D. Punitive Damages Proportionality

In paragraph VI.D. of the Concise Statement North River contends the punitive damages award is erroneous because it is disproportionate. This contention is premised on the opinion of North River's expert that the Pennsylvania Department of Insurance fine would not have exceeded $75,000. While the United States Supreme Court includes proportionality between a punitive damages award and civil penalties imposed in comparable cases as a guidepost, this is only part of the analysis. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 at 418 (2003). First, it is the proportionality between a punitive damages award "and the civil penalties **authorized** or imposed in comparable cases…." that must be reviewed. Id [emphasis added]. The Pennsylvania Unfair Insurance Practices Act authorizes the Department of Insurance to revoke an insurer's license (*see* 40 P.S. §1171.9), and this "authorized" penalty is much harsher than a $75,000 fine. *See Hollock v. Erie Ins. Exchange*, 842 A.2d at 422. The United State Supreme Court also set forth two other guideposts for punitive damages awards: the reprehensibility of the defendant's conduct (addressed above) and the disparity between the harm to the plaintiff and the punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campell,* 538 U.S. 408 at 418. In *Hollock* above, the Pennsylvania Superior Court found that the disparity from a 10 to 1 ratio of punitive damages to compensatory damages (which consisted of attorney fees, costs and interest) did not violate due process. The $30 million punitive damages award against North River approximates a 1 to 1 ratio with the compensatory damages ($29,812,801 for breach of contract, attorney fees, costs and interest). Hence, when the proportionality guidepost and the other two guideposts are examined, it is evident that no error was committed in assessing $30 million in punitive damages against North River.

VI. E. Consideration of Non-Parties

In paragraph VI.E. of the Concise Statement North River also contends I made an error by "considering the financial condition of non-parties in awarding punitive damages…." First, consideration of the financial condition of the other entities would be appropriate because they are related to North River and pool their premiums and losses with North River. *See Bombar v. West American Ins. Co.*, 2007 PA Super 222, 932 A.2d 78 at 94-95. Second, in determining the punitive damages award, I did not consider the financial condition of an entity other than North River. Given the financial wherewithal of North River described above, it will be able to absorb the $30 million expense without disruption of its operations. Because I did not consider the finances of non-parties, and, in any event, doing so would have been appropriate, I did not commit an error.

VII. A. Attorney Fee Award and Actual Charges

In paragraph VII.A. of the Concise Statement North River contends the attorney fee award is erroneous because "MSA never entered any evidence as to what Reed Smith actually charged until after close of evidence…." This argument is premised on the fact that I conducted a conference telephone call with counsel for both parties after the non-jury trial because I was uncertain of how MSA's "volume discount" applied to some of the Reed Smith invoices. This information was contained in the invoices admitted into evidence during the non-jury trial (*see* N.J.T., p. 239 and exhibits P-21A - P-21-J, P-22A -P-22L, P-23A – P-23L, P-24A – P-24L, P-25A – P-25K, P-26A – P-26L and P-27A – P-27I). I just wanted to be certain that I was interpreting all of the invoices correctly to avoid awarding Reed Smith its "standard budget rate," which often was higher than the amount billed to MSA. A subsequent letter from Reed Smith to me and North River's counsel provided a full explanation that allowed me to be certain as to the amount of the volume discount (it ranged between 10 and 32 percent) and how it was applied. 42 Pa.C.S. §8371 sets forth no procedure for assessing "attorney fees against the insurer." The Superior Court of Pennsylvania, in upholding an attorney fee award under 73 P.S. §201-9.2 in the Unfair Trade Practices and Consumer Protection Law, found a document with counsel's hours and hourly rate submitted at the end of trial with counsel's assertion that the hourly rate was fair and reasonable constituted sufficient information for determining the attorney fee award. *See Wallace v. Pastore*, 1999 PA Super 297, 742 A.2d 1090 at 1094. North River participated in a much more elaborate process, with Reed Smith providing its invoices far in advance of trial and North River calling multiple experts for opinions on their propriety. With no statutory procedure for assessing attorney fees and caselaw allowing minimal information, the fact that I needed a letter explaining the discounts allowed in the invoices admitted into evidence establishes no error. Even if I made an error by obtaining the explanation in the letter after the trial, there was credible expert testimony that the higher "standard budget rate" was reasonable. *See* N.J.T., pp. 334-335 and 374. Therefore, I correctly determined the amount of Reed Smith's attorney fees assessed against North River.

North River also contends the attorney fee award is erroneous because MSA never proved that it paid Reed Smith's invoices. However, the invoices themselves evidenced payment by MSA (*see* exhibits P-22D and P-26G) and MSA testimony was unrebutted that Reed Smith's invoices were paid. N.J.T., p. 369. Hence, MSA proved it paid Reed Smith's invoices.

VII. B. Level of Intent for Attorney Fee Award

In paragraph VII.B. of the Concise Statement North River contends the attorney fee award is erroneous because MSA "has not established that North River acted with the requisite level of intent to support penal remedies under 42 Pa.C.S. §8371…." The requisite level of intent for an attorney fee award under 42 Pa.c.S. §8371 is bad faith, and I previously described some of

the clear and convincing evidence of North River's bad faith. With bad faith proven it was within my discretion to award MSA attorney fees to compensate for expenses it incurred in litigation in which it prevailed. The attorney fee award was not an abuse of this discretion. Hence, the requisite level of intent for the attorney fee award was present, and I properly exercised my discretion in making the award.

VII. C. Attorney Fees After Settlement Offer

In paragraph VII.C. of the Concise Statement North River contends I made an error by awarding attorney fees after North River made a reasonable offer of settlement. In *Lohman v. Duryea Borough* (574 F.3d 163 (3d Cir. 2009)) the Court held that a $12,205 jury verdict following rejection of a $75,000 settlement offer was a valid basis for a reduction in the attorney fee award. Attorney fees are awarded based on the degree of a party's success, hence a rejected settlement offer that is approximately six times larger than the jury verdict indicates a low degree of success. *Id.* North River argues its September 6, 2016 $120 million settlement offer that was rejected by MSA indicates a low degree of success by MSA. I disagree because the $120 million was a "global" settlement offer for all North River policies issued to MSA that total $250 million in coverage. Therefore, this settlement offer is not relevant to MSA's degree of success. Since MSA obtained one hundred percent of the amount submitted to the jury and a $30 million punitive damages award, it achieved a very high degree of success. Hence, my award of attorney fees following North River's September 6, 2016 settlement offer was appropriate.

VII. D. Items Included in Attorneys Fee Award

In paragraph VII.D. of the Concise Statement North River contends I made an error by awarding "fees and costs not authorized by section 8371…." While North River includes fees to attorneys not of record in this proceeding, deposition transcription costs, mock jury costs, MSA's portion of the special discovery master's fees and jury consulting fees as unauthorized by 42 Pa. C.S. §8371, this legislation is silent as to what comprises "attorney fees." The U.S. Court of Appeals for the Third Circuit determined that "the object of an attorney fee award is to make the successful plaintiff completely whole" and the "obvious design" of 42 Pa. C.S. §8371 is to place the insured "in the same economic position [it] would have been in had the insurer performed as promised, by awarding attorney's fees as additional damages…." *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 236 (3d Cir. 1997). Hence, expenses ordinarily billed by attorneys to their clients are properly part of an attorney fee award. *See W. Va. Univ. Hosps. Inc. v. Casey*, 499 U.S. 83 at 87 n. 3 (1991) and *InvesSys, Inc. v. McGraw-Hill Co.s., Ltd.*, 369 F.3d 16 at 22 (1st Cir. 2004). All the expenses North River alleges are unauthorized by section 8371 are ordinarily billed by attorneys to their clients. It also is noteworthy that the expenses for contract attorneys, local defense counsel and national coordinating counsel are less than Reed Smith would have charged for the same work, and North River hired a jury consultant, mock juries as well as a "shadow jury" present throughout the jury trial. Hence, it was appropriate to include the expenses described above in the attorney fees award.

VIII. A. Interest Pre-Dating Ruling on Coal Dust Trigger

In paragraph VIII.A. of the Concise Statement North River contends my award of interest is erroneous because the interest began accruing before Judge Wettick's June 10, 2015 ruling that coal dust injuries begin upon exposure. *See* footnote no. 1 above. 42 Pa. C.S. §8371(1) authorizes an award of interest "from the date the claim was made by the insured…." I used the dates when MSA paid the settlements of the underlying claims as the start dates, which actually is a later point in time than the dates the claims were made by MSA. Therefore, North River's contention that interest on the coal dust claims should start after June 10, 2015 is meritless.

VIII. B. Interest Pre-Dating Ruling on Exhaustion

In paragraph VIII.B. of the Concise Statement North River contends my award of interest is erroneous because the interest began accruing before Judge Wettick's May 7, 2012 ruling on MSA's motion for partial summary judgment on the subject of exhaustion of the umbrella policies. This contention is meritless for the reasons set forth in the preceeding paragraph.

VIII. C. Compound Interest

In paragraph VIII.C. of the Concise Statement North River contends I made an error in my award of interest by utilization of compound interest. 42 Pa.C.S. §8371 is silent as to whether the award is limited to "simple" interest or allows for compound interest. Awarding only simple interest, however, would not put MSA financially in the position it would have been in if the settlement payments were made by North River. In that case, MSA would have been able to place the funds in an investment that earns compound interest. Since 42 Pa. C.S. §8371 is silent and compound interest furthers the purpose of 42 Pa.C.S. §8371, I was correct in awarding compound interest.

IX and X. Reed Smith's Supplemental Attorney Fees

In paragraphs IX and X of the Concise Statement, North River raises issues I have already addressed above, except in paragraph X. A. North River contends I made an error in the award of supplemental attorneys' fees because Reed Smith's fees "are insufficiently documented, include fees sought for excessive and unnecessary time" and "are based on rates that are excessive for the Pittsburgh market." I reviewed MSA's supplemental fee petition and Reed Smith fees are documented properly with the time spent necessary for representation of its client. Reed Smith's rates, based on credible testimony from its expert witness, are not excessive for the Pittsburgh market. Hence, there was no error in the award of supplemental attorneys' fees to Reed Smith.

XI. Cost of Transcripts of Trials

In paragraph XI of the Concise Statement, North River contends I made an error by awarding MSA supplemental court costs of $21,934.75 in reimbursement of the official court reporter's fees for producing transcripts of the trials. While an award of attorney fees is not made to the prevailing party without a statutory authorization, court costs ordinarily are imposed on the unsuccessful litigant. *See Smith v. Rohrbaugh*, 2012 PA Super 208, 54 A.3d 892. These costs, referred to as "taxable costs," include the Prothonotary's charges for filing a lawsuit and the Sheriff's charges for serving it. *Id.* The official court reporter's fees are similar as they originate from another "arm of the court" and customarily appear on the docket. Hence, I was correct in awarding them as court costs to MSA. Even if it was an error, the error would be harmless as the official court reporter's fees for transcribing a trial are ordinarily billed by attorneys to their clients and therefore could be awarded to MSA as part of its attorney fees.

BY THE COURT:
/s/Hertzberg, J.

[1] I will not be addressing paragraph I in the Concise Statement because the alleged error identified by North River involves rulings by Judge Wettick. North River alleges Judge Wettick erroneously determined that insurance coverage under the "continuous trigger" approach (*see J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993)) applies to the coal dust claims. Although Judge Wettick is retired and therefore unable to write an opinion, he explained his ruling in the Memorandum and Order of Court Dated June 10, 2015 (Document no. 501 in the docket of the Allegheny County Department of Court Records). MSA also appealed to the Superior Court of Pennsylvania and filed a Statement of Errors Complained of on Appeal. I will not be addressing any alleged errors raised by MSA because all involve Judge Wettick's rulings and are adequately explained by Judge Wettick's filings or his on the record statements.

[2] North River was permitted to show Mr. Berner's videotaped testimony of the amount of the compromise offer made by North River during the March, 2009 meeting because both parties agreed to allow it. *See* J.T., pp. 2104-2110.

[3] NIOSH stands for The National Institute for Occupational Safety and Health, a department of the Center for Disease Control

UPMC, a Pennsylvania Nonprofit, Non-Stock Corporation, UPMC Presbyterian Shadyside, and UPMC Community Medicine, Inc. v. Michael P. O'Day, d/b/a The Law Offices of Michael O'Day

Tortious Interference—Civil Conspiracy—Professional Conduct

Court grants preliminary objections to hospital's tortious interference and civil conspiracy claims against attorney alleged to have contacted patients to recruit them as plaintiffs for future lawsuits. Complaint failed to sufficiently plead facts or cite authority for a common law claim against an attorney in impending litigation. Complaint also failed to plead sufficient facts to support the other elements of a tortious interference with contractual relations claim and without an underlying tort, the civil conspiracy claim would fail. Court also struck references in Complaint to alleged violations of Professional Rules of Conduct because the Supreme Court has exclusive authority to supervise attorney conduct.

No. GD 17-3857. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
McVay Jr., J.—June 9, 2017.

MEMORANDUM and ORDER OF COURT

Facts and Procedural History

On March 14, 2017, UPMC, UPMC Presbyterian Shadyside, and UPMC Community Medicine (collectively referred to as "Plaintiffs") filed a civil complaint against attorney Michael O'Day ("Defendant") alleging: (1) tortious interference with contractual relations and prospective contractual relations and (2) civil conspiracy. The instant matter before this Court are preliminary objections filed on behalf of the Defendant.

Plaintiffs allege that Defendant recruited a former patient ("Jane Doe") of UPMC and Dr. Ghassan Bejjani ("Dr. Bejjani") and instructed Jane Doe to solicit other patients that had undergone a specialized operation performed by Dr. Bejjani. Complaint ¶ 26. According to Plaintiffs, Jane Doe reached out to at least one patient ("Patient A") via Facebook messenger and created an "unwarranted" fear about their health and operation. Complaint ¶¶ 33-35, 31. Patient A and Patient A's daughter were both operated on by Dr. Bejjani to correct Chiari Malformations. Eventually, Jane Doe and Patient A spoke on the phone, and Jane Doe stated that she was on "a mission to find" other patients at Defendant's direction. Complaint¶ 43. Jane Doe allegedly made numerous false and/or misleading statements to Patient A surrounding Patient A's decision to have both she and her daughter undergo the procedure. Complaint ¶46. Patient A and Defendant spoke on the phone on January 24, 2017, Complaint ¶ 48-49, and Defendant later forwarded an email to Patient A that contained a news article involving UPMC. Complaint ¶56. Plaintiffs contend that these actions were intended to "driv[e] a wedge" between UPMC and its patients. Complaint ¶ 25.

Eventually, Patient A unequivocally stated to Defendant she was not interested in joining Defendant's law suit against UPMC and Dr. Bejjani. Nevertheless, Plaintiffs maintain that Defendant continued to contact Patient A through phone and email. Complaint ¶¶ 64-65, 67. According to Plaintiff, patients that have received the decompression operation to address Chiari Malformations are particularly vulnerable and that the continuing contact with the physicians are a key component in treatment. Complaint ¶ 73-79. Plaintiffs indicate that they believe Defendant's conduct is on-going and that other patients may have been similarly contacted. Complaint ¶ 81.

Throughout the Complaint, Plaintiffs allege Defendant violated multiple aspects of the Pennsylvania Rules of Professional Conduct (the "Rules") through the abovementioned conduct. Complaint ¶¶ 27, 28, 32, 44, 64, 66, 90.

On April 11, 2017, Defendant filed Preliminary Objections and contend that the "lawsuit is without basis in existing law or ethics opinions, is subject to multiple deficiencies including legal insufficiency, privilege, immunity and public policy" and should be dismissed with prejudice. Preliminary Objection ¶¶ 3, 46. Defendant argues Plaintiffs' allegations of violations of professional conduct are an attempt to use the Rules as a "procedural weapon to impose civil liability for an attorney preparing a lawsuit against them." Prelim. Obj. ¶1. It is the Defendant's position that Plaintiffs' motive in filing the law suit was to hinder the filing of a lawsuit against Plaintiffs. Prelim. Obj. ¶ 6.

Relating to the tortious interference of contractual and prospective contractual relations, Defendant argues that Plaintiffs are unable to satisfy any of the four elements of the claim. Prelim. Obj.¶ 37. Defendant's position is heavily based on the assertion that the Plaintiffs have failed to demonstrate a contract exists at all. Prelim. Obj. ¶¶38-42. Additionally, Defendant argues that the use of the Rules to buttress a civil lawsuit is an improper infringement on the jurisdiction of the Pennsylvania Supreme Court. Prelim. Obj. 77-98. While Defendant continues to explain why his conduct was proper under the Rules, this Court and all parties agree with the position that such a determination lies solely with the Pennsylvania Supreme Court and Disciplinary Board. Finally, Defendant argues that the claim for civil conspiracy is legally insufficient and should be dismissed because: (1) an attorney cannot be held

liable for conspiracy with their own clients and (2) if the underlying tort of tortious interference with contractual relations were dismissed, no cognizable underlying tort would exist to support a claim for conspiracy.

In summary, Plaintiffs filed a two-count complaint alleging tortious interference with contractual and prospective contractual relations and conspiracy. Defendant filed preliminary objection seeking dismissal with prejudice arguing both counts are legally insufficient and that the conspiracy count fails for want of a valid, underlying tort claim. Additionally, Defendant raises public policy concerns and questions the motives of Plaintiffs in initiating this lawsuit.

Analysis

Initially, it is well settled law that preliminary objections in the nature of a demurrer calling for dismissal of a cause of action should be sustained only in cases that are clear and free from doubt. *Jones v. City of Philadelphia*, 893 A.2d 837, 843 (Pa. Commw. Ct. 2006). Moreover, even where the trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend. *See Harley Davidson Motor Co. v. Hartman*, 442 A.2d 284, 286 (Pa. Super. 1982).

Similarly, in *Foster v. UPMC S. Side Hosp.*, the Superior Court of Pennsylvania likewise held that a trial court's dismissal of a suit on preliminary objections will only be sustained where the case is free and clear of doubt. 2 A.3d 655, 662 (Pa. Super. 2010) (citing *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963, 966 (Pa. Super. 2009)). This Court is not "free and clear of doubt" to dismiss with prejudice but has present doubt concerning both of Plaintiffs' causes of action because, as it stands, the complaint fails to sufficiently plead facts or cite authority for a common law claim against an attorney in impending litigation. Further, assuming *arguendo*, Plaintiffs have sufficiently plead that a contractual relationship or protected business interest existed to support a tortious interference claim, this Court is unconvinced that Plaintiffs have plead sufficient facts to support the other elements of a tortious interference with contractual relations claim. It follows, without a sufficiently plead underlying tort, the Plaintiffs' civil conspiracy claim would fail.

Finally, this Court acknowledges that, generally, legal causes of action for tortious interference with a contract and injunctive relief may be appropriate when alleged attorney misconduct is the substantive issue. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1183–85 (1978). On the other hand, this Court also recognizes that "exclusive authority to regulate and supervise the conduct of attorneys" lies with the Supreme Court of Pennsylvania. *In re Adoption of M.M.H.*, 981 A.2d 261, 272 (Pa. Super. 2009). As a result, "the Rules of Professional Conduct do not have the effect of substantive law but, instead, are to be employed in disciplinary proceedings." *Id.* This principle is well outlined in the Preamble to the Rules of Professional Conduct:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide a structure for regulating conduct though disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, it does not imply that an antagonist in a collateral proceeding or transaction has standing to enforce the Rule. *Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.*

Id. at 273 (2009) (citing Pa.R.P.C., Preamble).

Conclusion

Accordingly, the Court will sustain the Defendant's preliminary objections as to both counts of Plaintiffs' complaint with leave to amend. Further, the Court will strike all references to attorney conduct and alleged violations of the Rules

BY THE COURT:
/s/McVay Jr., J.

Eric Robert Neff v. National Collegiate Athletic Association

Preliminary Objections

Preliminary objections to complaint by former college football player asserting negligence against the National Collegiate Athletic Association (NCAA) for failure to protect him from the long-term effects of concussions and sub-concussive blows to the head while playing collegiate football overruled. Court overruled preliminary objections based on lack of duty and proximate cause where NCAA has plenary power of its members and dictates standards education and protocols to its members.

No. GD-16-020465. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, J.—April 11, 2017.

MEMORANDUM ORDER

This case involves a Complaint in Civil Action filed by Plaintiff, Eric Robert Neff against Defendant National Collegiate Athletic Association ("NCAA") for injuries allegedly sustained by Plaintiff as a direct and proximate result of the tortious conduct of the Defendant in connection with its failure to take effective action to protect Plaintiff from the long-term effects of concussions and sub-concussive blows to the heard suffered while he played collegiate football in the NCAA.

Plaintiff was a student at Indiana University of Pennsylvania ("IUP") and played intercollegiate football there as outside linebacker during the 1997, 1998 and 1999 seasons. During this time period, Plaintiff suffered numerous repeated blows to the head during practices and games. He lost consciousness or had altered consciousness many times playing football. He was never informed that he had suffered an injury.

Plaintiff was evaluated for the first time on May 24, 2016. He reported ongoing symptoms including but not limited to forgetfulness, headaches, irritability, depression, impulsivity, anxiety, disorientation to space, social isolation, obsessive compulsive disorder, sleep disorder, reduced independence for activities of daily living, poor hygiene, financial irresponsibility, and loss of focus. He was informed that the neurobehavioral changes he was experiencing were related to the repetitive concussive and sub-concussive blows to his head.

Plaintiff's Complaint states a cause of action for negligence against the NCAA. The NCAA filed Preliminary Objections to Plaintiff's Complaint seeking dismissal of all claims against NCAA.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems. Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011).

The NCAA claims that Plaintiff has not alleged facts showing that the NCAA owed him a duty or that the NCAA's actions or inactions proximately caused his alleged injuries. The NCAA further argues that Plaintiff's Complaint should be dismissed based upon the statute of limitations.

Plaintiff argues that the NCAA was negligent in failing to educate, warn or disclose to Neff the risks inherent in football, failing to promulgate or adopt rules and regulations to address the dangers of football, misrepresenting or concealing facts about safe return to play or risks of football, and increasing the risk of harm. They cite *Palsgraf v. The Long Island Railroad Company,* 248 N.Y. 339, 162 N.E. 99, 101 (1928) for the concept that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Plaintiff alleges that the NCAA assumed a duty to Plaintiff by undertaking to act as a leader in providing a "healthy and safe" environment for student-athletes in their athletic programs through "research, education, collaboration and policy development." The Plaintiff also cites the fact that the NCAA assumed the duty owed to individual colleges to formulate guidelines for student-athlete safety. The Plaintiff has pled facts sufficient to establish the proximate cause of the Plaintiff's injuries. Specifically, the Plaintiff cites the NCAA's omission of appropriate safety standards regarding head injuries.

I was not persuaded by the NCAA's analogy to the American Bar Association and its assertion that it is no different than the ABA to which lawyers may or may not choose to belong and which organization has no power over any such lawyer. In contrast, the NCAA has plenary power over its constituent members and can, and does, dictate standards, education and protocols to the members in great detail. Thus, their analogy to the ABA is not persuasive.

Similarly, the suggestion that the Statue of Limitation has run is likewise inapposite. The injuries sustained can only be known when expert medical opinion says so. Here, the Plaintiff's injuries were diagnosed well within the Statute.

Therefore, the NCAA's Preliminary Objections are overruled; Answer in 30 days of this order.

BY THE COURT:
/s/O'Reilly, J.

April 11, 2017

Commonwealth of Pennsylvania v. Kenneth M. Reeves

Criminal Appeal—Homicide—Sufficiency—Weight of the Evidence—Expert Testimony—Jury Instruction—Prior Bad Acts—mens rea

Defendant challenges the evidence following his conviction of third-degree homicide in the death of a 5 ½ month old infant.

No. CC 201501958. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.
Cashman, A.J.—April 9, 2018.

OPINION

Appellant, Kenneth Reeves (hereinafter referred to as "Reeves"), was charged with one count of criminal homicide – third-degree murder (18 Pa.C.S. § 2501(a)), one count of aggravated assault (18 Pa.C.S. § 2702(a)(1)), and one count of endangering the welfare of children (18 Pa.C.S. § 4304(a)(1)), in connection with the death of five-and-a-half-month-old Kamero Newton. Following a jury trial, Reeves was convicted on all charges. This appeal followed.

On Saturday, December 6, 2014, detectives with the Pittsburgh Police were notified that a five-and-a-half-month old female child was found unresponsive and not breathing inside of 417 Parklow Street in the City of Pittsburgh. Detectives were advised that the child, who would later be identified as Kamero Newton (hereinafter referred to as "victim"), was transported to Children's Hospital for evaluation and treatment. Upon receiving this information, detectives went to Children's Hospital, and, when they arrived, detectives observed medical personnel attempting to resuscitate the victim. The emergency room attending physician told investigators the victim was being placed on a ventilator in the Intensive Care Unit and was listed in critical but stable condition.

While at Children's Hospital, detectives spoke with paramedics who told them that, upon arrival at the victim's residence, they discovered the victim lying on the floor next to her crib. Paramedics informed detectives that the victim's crib was equipped with railings which would have prevented her from falling or rolling out of the crib on her own. Paramedics related that, when they initially assessed the victim, she was unresponsive, had no pulse, and was not breathing. Paramedics immediately began resuscitation efforts and continued those efforts as they transported the victim to Children's Hospital.

After speaking with doctors and paramedics, detectives conducted an initial interview of the victim's mother, Julie Vojtash (hereinafter referred to as "Vojtash"). Vojtash told detectives that she had placed the victim in her crib, located on the third floor of the residence, at approximately 8:00 p.m., and stated that the victim quickly fell asleep. Vojtash went on to explain that the victim had recently begun teething, which caused her to become fussy at times, but described her daughter as an otherwise happy, healthy baby.

During her initial interview, Vojtash told investigators that Reeves was her boyfriend, and explained that he arrived at her residence at approximately 9:30 p.m. on the date of the incident. At the time of the Reeves's arrival, Vojtash was babysitting her sister's children, who lived on the first floor of the residence. At approximately 10:00 p.m., Vojtash left Reeves and the victim – who was asleep in her crib – on the third floor and went downstairs to check on the other children. While downstairs speaking

with her brother, Vojtash heard the victim crying loudly, and, when she went back to the third floor, she observed the victim awake and crying in her crib.

When Vojtash asked Reeves what had occurred, he replied: "I don't know." Within minutes of Vojtash returning to the third floor, the victim lost consciousness and stopped breathing, while her mother was still holding her. After placing the victim on the floor and calling 911, Vojtash and her brother began performing CPR.

During a subsequent interview, Vojtash recalled two recent incidents in which she had briefly left the victim alone with Reeves. On both occasions, she returned to find the victim crying loudly for no obvious reason. Vojtash told detectives that she did not suspect anything unusual when she discovered the victim crying, telling investigators that she attributed the victim's crying to teething pain.

In the course of their investigation, detectives traveled to the victim's Parklow Street address. When they arrived at the victim's residence, investigators approached a male occupant – who would later be identified as Kenneth Reeves – and asked the occupant to identify himself. Reeves told detectives that his name was "Kenny Direnna." However, detectives later discovered that Reeves provided false identification information because he was on probation for a previous conviction of endangering the welfare of children and aggravated assault. Police also discovered a suboxone pill and two stamp bags of suspected heroin with Reeves's belongings. After a brief conversation with detectives, Reeves was released from the scene and advised that he would receive a summons for the narcotics violations.

On Monday, December 8, 2014, detectives returned to Children's Hospital to check on the condition of the victim. Detectives spoke with the attending physician and a social worker, who advised them that the victim was technically brain dead and that arrangements were being made with Vojtash to determine when lifesaving efforts would be discontinued. On the same day, detectives met with a caseworker from the office of Allegheny County Children, Youth & Families. The caseworker informed detectives that Dr. Rachel Berger from Children's Hospital had diagnosed the victim suffered an acute subdural hematoma and cerebral edema. Dr. Berger indicated that the victim's injuries were caused by recent head trauma, which would have caused her to exhibit signs and symptoms associated with head trauma not long after the precipitating injury occurred. Dr. Berger also advised the caseworker that the emergency room notes referenced bruising on the victim's left temple and right arm.

Detectives subsequently attempted to contact Dr. Berger by telephone to confirm the findings of the caseworker's report, but were instead directed to Dr. Janet Squires, who was on duty at that time. Dr. Squires confirmed Dr. Berger's findings, and added that victim had also suffered extensive bilateral retinal hemorrhaging with vitreous hemorrhage, which, along with the other injuries, clearly evinced physical abuse. Doctors confirmed that the victim did not have any underlying medical conditions which would predispose her to the injuries which ultimately led to her death.

The victim was taken off of life support on December 9, 2014, and was subsequently pronounced deceased later that same day. On December 30, 2014, the Allegheny County District Attorney's Office received confirmation from the Allegheny County Medical Examiner's Office that the victim's cause of death was blunt force trauma to the head, and the manner of death was homicide. Based upon the information gathered from their investigation, detectives requested a warrant for Reeves's arrest for third-degree murder, aggravated assault, and endangering the welfare of children (hereinafter referred to as "EWOC").

Prior to the commencement of Reeves's jury trial on May 22, 2017, both the Commonwealth and Reeves filed numerous pretrial motions. These pretrial motions included, *inter alia*, cross motions to preclude medical expert evidence and testimony. Reeves also filed a pretrial motion to preclude the introduction of prior bad acts evidence, as well as a motion to preclude the introduction of his videotaped police interrogation. At trial, the Commonwealth offered the testimony of Dr. Rachel Berger, a board certified pediatric physician from Children's Hospital, Dr. Abdulrezak Shakir, the pathologist who performed the victim's autopsy, and Dr. Bennet Omalu, a world-renowned pathologist and Chief Medical Examiner of San Joaquin County, California who performed an independent investigation into the victim's death at the Commonwealth's request. Collectively, the Commonwealth's medical experts opined that: (1) the victim's cause death was blunt force trauma to the head; (2) the manner of death was homicide; (3) the victim did not have any preexisting medical conditions which would have predisposed her to the conditions which caused her death; and (4) the victim's death was not accidental.

At the conclusion of his jury trial on May 31, 2017, Reeves was found guilty of criminal homicide – third-degree murder, aggravated assault, and endangering the welfare of children. On August 28, 2017, Reeves was sentenced to a term of incarceration of 20 to 40 years on the third-degree murder conviction, followed by a consecutive term of 2.5 to 5 years on the endangering the welfare of children conviction. On the same day, Reeves entered a negotiated guilty plea to multiple counts of possession of controlled substances and one count of possession of paraphernalia. This Court sentenced Reeves to a term of incarceration of 6 to 12 months at each count, concurrent to each other, and to the sentence imposed for his convictions for criminal homicide and EWOC.

On August 30, 2017, Reeves filed timely post-sentence motions, which were subsequently denied on October 20, 2017. Reeves thereafter filed a timely notice of appeal with the Pennsylvania Superior Court on October 24, 2017. This Court subsequently directed Reeves to file his concise statement of matters complained of on appeal pursuant to Pa.R.Crim.P. 1925(b). In his concise statement of matters complained of on appeal, Reeves raises multiple claimed errors, including assertions that the evidence presented at trial was insufficient to sustain the verdict at all counts, that the verdict at all counts was against the weight of the evidence, and that this Court abused its discretion at various stages of the proceedings.

I. Sufficiency of the Evidence

Reeves's first claimed error is a general assertion that the Commonwealth failed to present sufficient evidence to sustain the verdict at all counts. Reeves argues that no evidence was presented to establish that he had any involvement in the victim's death. Reeves then outlines why he believes the evidence presented at trial was insufficient to sustain his conviction at each count. Specifically, Reeves contends that the Commonwealth's evidence was insufficient to prove that he possessed the requisite *mens rea* to sustain his conviction for third-degree murder. Reeves also asserts that the Commonwealth failed to prove that he possessed the requisite state of mind to sustain a conviction for aggravated assault. In addition, Reeves argues that the evidence presented at trial was insufficient to establish that he knowingly endangered the victim, and contends that the Commonwealth failed to present sufficient evidence to prove that he was within the class of persons on which criminal liability may be imposed pursuant to Pennsylvania's EWOC statute.

The standard applied when reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. *Com. v. Golphin*, 161 A.3d 1009, *appeal denied*, 170 A.3d 1051 (Pa. 2017) (*citing Com. v. Harden*,

103 A.3d 107 (Pa.Super. 2014)). A trial court may not weigh the evidence and substitute its judgment for that of the fact-finder. *Id.* In addition, the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. *Id.*

The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Id.* Moreover, in applying the sufficiency of the evidence test, the entire record must be evaluated, and all evidence actually received must be considered. *Id.* The finder of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence. *Id.* Lastly, in viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, the court must give the prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Id.* Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact may be drawn from the combined circumstances. *Id.*

A. Third-Degree Murder

Reeves's first sufficiency argument relates to his third-degree murder conviction. Third-degree murder is defined as all other kinds of murder, other than first degree murder or second-degree murder. *Com. v. Marquez*, 980 A.2d 145, 148 (Pa.Super. 2009) (*quoting* 18 Pa.C.S.A. § 2502(c)). Third degree murder, as defined by Pennsylvania case law, is a killing done with malice. *Com. v. Marquez*, 980 A.2d at 148 (*quoting Com. v. MacArthur*, 629 A.2d 166, 167–68 (Pa.Super. 1993)).

Malice exists where there is a particular ill-will, wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences, and a mind regardless of social duty. *Com. v. Marquez*, 980 A.2d at 148 (*quoting Com. v. Melechio*, 658 A.2d 1385, 1388 (Pa.Super. 1995)). Malice can be proven by establishing that an actor consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm. *Com. v. Golphin*, 161 A.3d at 1018 (*citing Com. v. Devine,* 26 A.3d 1139, 1146 (Pa.Super. 2011)). Malice may be inferred by considering the totality of the circumstances. *Com. v. Golphin*, 161 A.3d at 1018 (*citing Com. v. Dunphy*, 20 A.3d 1215, 1219 (Pa.Super. 2011)).

In the instant appeal, Reeves simply asserts that the Commonwealth did not present sufficient evidence to prove that he acted with malice in bringing about the death of the victim. Reeves does not detail any claimed deficiencies in the evidence presented in support of his third-degree murder conviction. Rather, he simply offers a blanket assertion that that the Commonwealth did not sustain its burden of proving that he acted with malice in bringing about the victim's death.

Malice, it must be remembered, may be proven by means of wholly circumstantial evidence. *Com. v. Golphin*, 161 A.3d 1009; *Com. v. Harden*, 103 A.3d 107. At Reeves's trial, the Commonwealth presented medical evidence from multiple medical expert witnesses, including Dr. Berger, Dr. Shakir, and Dr. Omalu. In addition to the expert witness testimony, the Commonwealth offered the testimony of the victim's mother and the detectives who investigated the circumstances of the victim's death. Collectively, the testimony of these witnesses established, to the jury's satisfaction, that Reeves acted with malice in bringing about the victim's death. The Commonwealth's evidence was therefore clearly sufficient to sustain Reeves's conviction for third-degree murder.

B. Endangering the Welfare of Children

Next, Reeves asserts that the Commonwealth's evidence was insufficient to support his conviction for endangering the welfare of children. Specifically, Reeves alleges that the Commonwealth failed to establish that he acted knowingly in endangering the victim. Like his other sufficiency arguments, Reeves points to no substantive evidence which supports his contention, nor does he address the fact that the Commonwealth may sustain an EWOC conviction by proving that a defendant acted with criminal intent or recklessness. *Com. v. Moore*, 395 A.2d 1328 (Pa.Super. 1978).

In Pennsylvania, "[a] parent, guardian, or other person supervising the welfare of a child under 18 years of age …commits an offense if he knowingly endangers the welfare of the child by violating the duty of care, protection, or support." *Com. v. Leatherby*, 116 A.3d 73, 81 (Pa.Super. 2015) (*quoting* 18 Pa.C.S.A. § 4304(a)). The Commonwealth is not required to prove malice in order to sustain a verdict for EWOC; the prosecution must only establish that the defendant acted with criminal intent, knowledge, or recklessness. *Com. v. Moore*, 395 A.2d 1328. In his 1925(b) statement, Reeves does not attempt to address the criminal intent or recklessness elements. He merely asserts that the Commonwealth did not present sufficient evidence to prove that he acted knowingly in endangering the victim.

At trial, the Commonwealth presented medical expert testimony establishing that the victim's cause of death was blunt force trauma to the head. J.T.T., 405:23-25; 406:1-7. The Commonwealth's experts also testified that the injuries which caused the victim's death were not the result of any preexisting condition or accident. J.T.T., 261:13-25; 408:12-25; 409:1-4. In addition, the victim's mother testified generally that, aside from occasional teething pain, the victim was a generally happy, healthy child, and that, when she left the victim with Reeves, the victim was in no distress, and appeared to be normal.

After considering the evidence presented at trial, the jury found that the prosecution's evidence established that Reeves acted with the requisite criminal intent, knowledge, and/or recklessness in harming the victim. Accordingly, Reeves's argument that the Commonwealth did not prove that he possessed the state-of-mind necessary to sustain his conviction for EWOC must fail.

In addition to his argument that the Commonwealth failed to establish that he acted knowingly in harming the victim, Reeves contends that the Commonwealth failed to establish that he was within the class of persons that can be held criminally liable for endangering the welfare of children pursuant to § 4304(a). Pennsylvania's EWOC statute expressly provides that the class of persons subject to criminal liability includes, "…parent(s), guardian(s), or *other person(s) supervising the welfare of a child* under 18 years of age." 18 Pa.C.S.A. § 4304(a) (emphasis added). The Pennsylvania Supreme Court has interpreted the phrase, "person responsible for the child's welfare" to include persons such as baby-sitters and others who have permanent or temporary custody and control of a child. *Com. v. Kellam*, 719 A.2d 792, 796 (Pa.Super. 1998) (*citing Com. v. Gerstner*, 540 Pa. 116 (1995))[1]. Criminal liability under § 4304(a) may be based on either an affirmative act or a failure to perform a duty imposed by law. *Com. v. Kellam*, 719 A.2d at 796 (*citing* 18 Pa.C.S.A. § 301)).

In *Kellam*, the defendant was charged with EWOC in connection with the death of his girlfriend's infant daughter. *Com. v. Kellam*, 719 A.2d 792. The victim's autopsy revealed that she had not had any food or fluids in the twenty-four to forty-eight-hour period preceding her death. *Id.* The Commonwealth presented evidence that, during the vast majority of this time, the defendant was the only adult who could care for the dying infant. *Id.* During Kellam's trial, the trial court defined the defendant's duty to the victim by explaining that, "a person responsible for the child's welfare" includes "[a] person who provides permanent or temporary care, supervision, … or control of a child in lieu of parental care, supervision and control." *Id.*[2] At the conclusion of his jury trial, Kellam was convicted.

On appeal, Kellam challenged his EWOC conviction, arguing that the duty imposed under § 4304(a) is limited to natural and

adoptive parents. *Id.* Kellam argued that he could not be deemed to have had custody and control over the victim because the child's mother was in the house at the time of the infant's death. *Id.* The Pennsylvania Supreme Court squarely rejected Kellam's contention that he was not within the class of persons to which Pennsylvania's EWOC statute applies, finding that the mother's physical presence in the house was irrelevant. *Id.* The Supreme Court explained that: "[i]n this age where children reside in increasingly complex family situations, we fail to understand why criminal liability should be strictly limited to biological or adoptive parents." *Id.* at 796. The Kellam Court went on to state that, "whenever a person is placed in control and supervision of a child, that person has assumed such a status relationship to the child so as to impose a duty…" *Id.*

In reaching its decision in *Kellam*, the Pennsylvania Supreme Court also addressed the trial court's jury instructions, holding that the trial court's instructions defining Kellam's duty to the victim accurately stated the law of the Commonwealth. *Com. v. Kellam*, 719 A.2d 792. Accordingly, the Supreme Court concluded that the Commonwealth had presented sufficient evidence to support the jury's implicit finding that appellant provided control and supervision of the child while the infant's mother was otherwise occupied. *Id.* Relying on the same reasoning, the Supreme Court also determined that the jury's verdict was clearly not against the weight of the evidence. *Id.*

The facts of the instant matter are strikingly similar to those in *Kellam*. Reeves was involved in a romantic relationship with the victim's mother and had been entrusted with the care of the victim on multiple occasions. The victim's mother testified that Reeves had even acted as a babysitter for the victim while the she was at work or attending to her other child. J.T.T., 124:17-25. Reeves's relationship to the victim was therefore clearly sufficient to subject him to criminal liability pursuant to Pennsylvania's EWOC statute. *See Kellam*, 719 A.2d at 796 (baby-sitters and others who have permanent or temporary custody and control of a child are subject to the provisions of § 4304). Accordingly, Reeves's sufficiency claims with respect to his conviction for endangering the welfare of children are without merit.

C. Aggravated Assault

Reeves's final sufficiency argument relates to his conviction for aggravated assault. At Reeves's sentencing, this Court found that the charge of aggravated assault merged into the third-degree murder count, and therefore no sentence was imposed in relation to Reeves's aggravated assault conviction. As such, the Court need not address the errors raised in Reeves's 1925(b) with respect to his aggravated assault conviction. This Court does, however, believe that the Commonwealth sustained its burden with respect to Reeves's aggravated assault conviction for the same reasons set forth in the preceding sections of this Opinion.

II. Weight of Evidence

In addition to his sufficiency arguments, Reeves also raises claims that the verdict at all counts was against the weight of the evidence. Much like his sufficiency arguments, Reeves generally asserts that the verdict at all counts was against the weight of the evidence, then proceeds to detail why he believes the verdict at each count was against the weight of the evidence. The gist of Reeves's argument is that the evidence presented by the Commonwealth was so weak and insubstantial that the Commonwealth could not prove various elements of each crime charged. Reeves offers little in the way of factual support for his contentions; he simply argues that the jury improperly focused on his prior bad acts and should have placed more – or less – significance on certain evidence presented at trial.

A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence. *Com. v. Davis*, 799 A.2d 860, 865 (Pa.Super. 2002) (*citing Com. v. Merrick*, 338 Pa.Super. 495 (1985)). The test is not whether the court would have decided the case in the same way, but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail. *Id.*

When addressing a challenge to the weight of the evidence, the role of the trial judge is to determine that, notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice. *Com. v. Stokes*, 78 A.3d 644, 650 (Pa. 2013) (*quoting Com. v. Widmer*, 744 A.2d 745, 751–52 (Pa. 2000)). In order for an appellant to prevail on a challenge to the weight of the evidence, "the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Com. v. Sullivan*, 820 A.2d 795, 806 (Pa.Super. 2003)).

The decision to grant or deny a motion for a new trial based on a challenge to the weight of the evidence is committed to the sound discretion of the trial court, because only the trial court observed witnesses and other evidence firsthand. *Com. v. Perez*, 664 A.2d 582 (Pa.Super. 1995), abrogated on other grounds. Where the record adequately supports the trial court's decision, the trial court has acted within the limits of its discretion. *Com. v. Clay*, 619 Pa. 423, 431 (2013) (*quoting Com. v. Brown*, 538 Pa. 410 (1994)) (internal quotations omitted).

Appellate review of a weight of the evidence claim is limited to a review of the trial judge's exercise of discretion, rather than underlying question of whether verdict was against weight of evidence. *Com. v. Widmer*, 689 A.2d 211 (Pa. 1997); *Com. v. Rodriguez*, 174 A.3d 1130 (Pa.Super. 2017); *Com. v. Brown*, 648 A.2d 1177 (Pa. 1994). Merely referring to contradictory evidence presented at trial – as Reeves does in the instant appeal – does not entitle a defendant to new trial on ground that verdict was against weight of evidence, nor is this a sufficient basis to support a finding that the trial court abused its discretion. *Com. v. Brown*, 648 A.2d 1177. Under the rigorous standards established by the Pennsylvania Supreme Court, Reeves's self-serving assertions are insufficient to support his contention that his convictions for third-degree murder, aggravated assault, and endangering the welfare of children were against the weight of the evidence.

III. Abuse of Discretion

A. Prior Bad Acts

Reeves's next argument is that this Court abused its discretion with respect to a litany of evidentiary issues during trial. On appeals challenging an evidentiary ruling of the trial court, the trial court's decision will not be reversed absent a clear abuse of discretion. *Com. v. King*, 959 A.2d 405, 411 (Pa.Super. 2008) (*citing Com. v. Bishop*, 936 A.2d 1136, 1143 (Pa.Super. 2007). Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias, or ill will. *Id.*

Reeves's first claimed error is that this Court abused its discretion when it permitted the Commonwealth to introduce evidence of his prior bad acts. Specifically, Reeves argues that this Court erred in permitting the Commonwealth to introduce evidence of his prior criminal conviction for aggravated assault and EWOC, as well as testimony from multiple family members that they suspected that Reeves had previously physically abused the victim.

Reeves asserts that these prior bad acts were not sufficiently similar to the events alleged in the instant case, and that evidence of these acts did not meet the standard for any permissible exception to Pa.R.Evid. 404(b). Reeves contends that evidence of his prior bad acts served only to cause confusion on the part of the jury. In the alternative, Reeves argues that it was an abuse of discretion for this Court to permit the prosecution to introduce evidence from his prior conviction, rather than simply providing the certified conviction to the jury.

In addition to his assertions that this court abused its discretion in permitting the Commonwealth to introduce evidence of his prior bad acts, Reeves argues that this Court erred by admitting his videotaped interrogation at trial. Reeves asserts that the jury should not have been permitted to view his videotaped interrogation because the video impermissibly implied that he had a propensity for perpetrating crimes against children because he had previously pled guilty to charges involving children. In the alternative, Reeves contends that certain portions of his interrogation video to which he objects should not have been shown to the jury.[3]

Generally, evidence of prior bad acts or unrelated criminal activity is inadmissible to show that a defendant acted in conformity with those past acts, or to show criminal propensity. *Com. v. Aikens*, 990 A.2d 1181, 1185 (Pa.Super. 2010) (*citing Com. v. Powell*, 956 A.2d 406, 419 (Pa. 2008). However, evidence of prior bad acts may be admissible when offered to prove some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Before the Commonwealth is permitted to introduce evidence of prior bad acts, it is required to provide the defendant with notice of its intention to present such evidence pursuant to Pa.R.E. 404(b)(3).[4]

In determining whether evidence of other prior bad acts is admissible, the trial court is obliged to balance the probative value of such evidence against its prejudicial impact. *Com. v. Aikens*, 990 A.2d at 1185. In applying this balancing test, the trial court is not, "required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged." *Com. v. Hairston*, 624 Pa. 143, 159–60 (2014) (*quoting Com. v. Lark*, 543 A.2d 491, 501 (Pa. 1988)); *Com. v. Powell*, 956 A.2d 406 (2008). Moreover, prejudicial evidence may be admissible so long as it is not unduly so. *See Com. v. Dillon*, 925 A.2d 131, 141 (Pa. 2007) ("Evidence will not be prohibited merely because it is harmful to the defendant.").

In the instant matter, evidence of Reeve's prior bad acts was admissible to establish the chain of events and pattern of abuse that eventually led to the victim's death. *See Com. v. Powell*, 598 Pa. 224. The evidence was also admissible to show Reeves's intent and malice towards the victim and absence of mistake in bringing about the victim's death. *Id.* Finally, evidence of Reeve's prior bad acts was admissible to show a common scheme or plan. *Id.* This is especially true, given the commonality of the age of the victim in the instant matter and that of Reeves's previous victim.

B. Medical Expert Testimony

Reeves next claimed error is that this Court abused its discretion when it allowed the Commonwealth to introduce the testimony of Dr. Bennett Omalu. Reeves argues Dr. Omalu's testimony was inadmissible because Dr. Omalu did not perform an independent evaluation of the victim, but rather adopted the findings of Dr. Clark. Reeves argues that this was a violation of his confrontation right to cross-examine Dr. Clark. Reeves also contends that this Court abused its discretion by allowing Dr. Omalu to testify regarding conclusions that were beyond the scope of his report.

Prior to trial, the defense moved to preclude the testimony of Dr. Omalu, arguing that this testimony would violate his confrontation clause rights. Deft.'s Mot. in Limine, filed May 2, 2017; Pretrial Mot. Hrg., May 12, 2017, 11:1-5. The Commonwealth challenged Reeves's assertion that Dr. Omalu merely adopted Dr. Clark's findings by pointing out that Dr. Omalu conducted a thorough, independent evaluation and only relied on Dr. Clark's findings to the extent that those findings provided insight and background into the initial investigation. Pretrial Mot. Hrg., May 12, 2017. Reeves's motion to preclude Dr. Omalu's testimony, which raised the same arguments that Reeves asserts in the instant appeal, was properly denied.

Next, Reeves asserts that this Court abused its discretion by precluding the defense from calling Steven A. Koehler, MPH, PhD[5] as an expert witness. In the instant appeal, Reeves argues that Pa.R.Evid. 701 and 702 define "expert witness" broadly, and that Dr. Koehler had relevant evidence which would have impeached the Commonwealth's expert. Reeves does not address the deficiencies in Dr. Koehler's qualifications, nor does he discuss Dr. Koehler's misrepresentations to the Court regarding his education, training, and experience.

Prior to the commencement of trial, the Commonwealth moved to preclude the proposed testimony of Dr. Koehler on the basis that Dr. Koehler did not possess the requisite education and training to form conclusions as to the victim's specific cause and manner of death. Com. Mot. in Limine, filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 2:9-12. The Commonwealth pointed out that Dr. Koehler is an epidemiologist, not a medical doctor, and would have only been competent to provide general statistical data. Com. Mot. in Limine, filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 2:14-25. The Commonwealth also asserted that Dr. Koehler had never testified as an expert regarding cause of death, and that he was unqualified to reach such medical conclusions. Com. Mot. in Limine, filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 2:18-20.

In addition to its contention that Dr. Koehler lacked the requisite qualifications to testify as to the victim's cause and manner of death, the Commonwealth also alleged that Dr. Koehler's *curriculum vitae* contained patent misrepresentations with respect to his educational background. Com. Mot. in Limine Mot., filed December 5, 2016; Pretrial Mot. Hrg. Tr., May 12, 2017, 4:6-23. Specifically, the Commonwealth advised this Court that, during the course of its investigation into Dr. Koehler's background, it discovered patent misrepresentations related to his education, training, and experience. Tr. of Conference in Chambers, December 8, 2016, 3:15-8:18. The Commonwealth informed this Court that these misrepresentations were sufficient to warrant a criminal investigation by the Allegheny County District Attorney's Office. Tr. of Conference in Chambers, December 8, 2016, 8:23-25.

This Court found the patent misrepresentations in Dr. Koehler's CV to be so troubling that, after being made aware of the inaccuracies, this Court advised the defense that, should Dr. Koehler be called to testify at trail, the Court would be compelled to advise Dr. Koehler of his *Miranda* rights. Tr. of Conference in Chambers, December 8, 2016, 12:7-12. The Commonwealth's motion to preclude the proposed testimony of Dr. Koehler was thereafter properly granted.

C. Jury Instructions

Reeves next claimed error is that this Court abused its discretion by instructing the jury that Reeves was the victim's sole care giver. When evaluating the propriety of jury instructions, an appellate court will look to the instructions as a whole – not simply isolated portions – to determine if the instructions were improper. *Com. v. Rodriguez*, 174 A.3d 1130, 1146 (*citing Com. v. Antidormi*, 84 A.3d 736, 754 (Pa.Super. 2014)). The Pennsylvania Superior Court has noted that, "it is an unquestionable maxim of law in this

Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." *Id.* Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error. *Id.*

In the instant matter, Reeves has offered nothing which would indicate that this Court abused its discretion with respect to its jury instructions. This Court's jury instructions clearly, adequately, and accurately stated the law. *Id.* Reeves has cited no evidence to the contrary. Accordingly, Reeves's claimed errors with respect to this Court's jury instructions are without merit.

D. Mistrials

Reeves's final substantive argument is that this Court abused its discretion by failing to grant his mistrial requests at various stages of his jury trial. First, Reeves argues that this Court abused its discretion by failing to grant his request for a mistrial following the Commonwealth's opening statement, during which the Commonwealth referenced evidence of Reeves's prior bad acts. Reeves also argues that this Court abused its discretion in failing to grant his request for a mistrial following Dr. Omalu's testimony to conclusions that Reeves asserts were beyond the scope of his report. For the reasons set forth in the preceding portions of this Opinion which address Reeves's argument that evidence of his prior bad acts and Dr. Omalu's testimony should not have been admitted, Reeves's abuse of discretion claims with respect to his mistrial requests are without merit.

BY THE COURT:
/s/Cashman, A.J.

Dated: April 9, 2018

[1] Interpreting 42 Pa.C.S.A. § 5554, Tolling of Statute.

[2] Referencing the Child Protective Services Law, 23 Pa.C.S.A. § 6303.

[3] Reeves argues that the jury should not have been permitted to hear comments made by investigating officers in the video because the officers' comments served only to inflame the passions of the jury. Reeves also argues that portions of the interrogation video in which officers made comments concerning child abuse and the medical condition of the victim were impermissible under Rules 701 and 702 because the officers were not qualified to provide opinions related to medical conditions. Finally, Reeves alleges that the jury should not have been permitted to view portions of his interrogation video in which detectives referenced discovery of drugs with his belongings on the third floor of the victim's residence.

[4] The Commonwealth filed its notice of intention to present prior bad acts evidence on August 12, 2015.

[5] Dr. Koehler is an epidemiologist who was appointed by the Court pursuant to Reeves's Motion to Appoint Expert Witness.